

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 22, 2017 appellant, then a 42-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that, on May 18, 2017, he sustained an injury to the right wrist when apprehending a suspect while in the performance of duty. He did not initially stop work. OWCP accepted the claim for strained muscles, fascia, and tendons at wrist and hand level, of the right hand. On August 11, 2017 appellant underwent an OWCP-authorized right wrist diagnostic arthroscopy and debridement of triangular fibrocartilage complex (TFCC) tear. He returned to full-duty work on October 2, 2017.

On January 22, 2018 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated January 25, 2018 to appellant's treating physician, Dr. David Shenassa, a Board-certified hand surgeon, OWCP requested that he submit a permanent impairment evaluation addressing whether appellant had reached maximum medical improvement (MMI) and the extent of any employment-related impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It afforded him 30 days to respond.

In a March 6, 2018 report, Dr. Shenassa noted that appellant presented post right wrist diagnostic arthroscopy with debridement of the TFCC on March 11, 2017. He indicated that appellant had returned to most normal activities and wore a wrist strap with some activities. Dr. Shenassa related that appellant had no problems with activities of daily living, but had "a little tenderness when using a gun." He examined appellant's right wrist and found full range of motion (ROM) and no tenderness to palpation over the TFCC. Dr. Shenassa indicated that appellant could return to normal activities as tolerated and advised that he had reached MMI. He opined that appellant had "an upper body impairment rating of four percent and total body impairment rating of one percent."

In an April 30, 2018 report, Dr. Morley Slutsky, Board-certified in occupational medicine and a district medical adviser (DMA), noted appellant's history of injury and treatment and utilized the A.M.A., *Guides* to review the March 6, 2018 report from Dr. Shenassa. He noted that Dr. Shenassa did not provide any valid ROM measurements per the criteria in the A.M.A., *Guides*. Dr. Slutsky explained that Dr. Shenassa found a "little bit" of tenderness, but his physical examination was normal, and there were no objective residuals related to the TFCC tear. He opined that this placed appellant into a class 0 for the diagnosis (wrist regional grid, Table 15-3, page 396, A.M.A., *Guides*), and further opined that the final upper extremity permanent impairment was zero percent.

Dr. Slutsky further noted that while Dr. Shenassa stated that appellant had "five percent upper body impairment, which does not exist" as a schedule award was appropriate for "upper

³ A.M.A., *Guides* (6th ed. 2009).

extremity impairment, not an upper body impairment.” He determined that appellant reached MMI on March 6, 2018.

By decision dated May 4, 2018, OWCP denied appellant’s schedule award claim, finding that he had not submitted medical evidence in conformance with the A.M.A., *Guides*, establishing permanent impairment of his right upper extremity warranting a schedule award.

OWCP thereafter received November 16 and December 12, 2017 notes from an occupational therapist.

By appeal request form received on May 21, 2018 appellant requested reconsideration. No additional argument or evidence was received.

By decision dated June 1, 2018, OWCP denied appellant’s request for reconsideration of the merits of the claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body.⁶ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ For decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*.⁸ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.⁹

The sixth edition requires identifying the impairment for the class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *D.F.*, Docket No. 18-1337 (issued February 11, 2019).

⁷ *Id.*

⁸ A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010)

⁹ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

examination (GMPE), and clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹¹

Regarding the application of ROM or diagnosis-based impairment (DBI) methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

“Upon initial review of a referral for upper extremity evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, the DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*” (Emphasis in the original.)¹²

The Bulletin further advises:

“If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE [claims examiner].”¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his right upper extremity warranting a schedule award.

In a March 6, 2018 report, Dr. Shenassa examined appellant’s right wrist and found full ROM, no tenderness to palpation over the TFCC and advised that appellant had reached MMI. He opined that appellant had an “upper body” permanent impairment rating of four percent and a “total body” permanent impairment rating of one percent. The Board notes that FECA does not allow schedule awards for impairment of the upper body or the body as a whole.¹⁴ Schedule awards are only payable for permanent impairment of scheduled members or functions of the body.¹⁵ Since Dr. Shenassa found that appellant had normal ROM of the right wrist, and he did not evaluate permanent impairment of appellant’s right upper extremity based upon his accepted

¹⁰ A.M.A., *Guides* 383-492.

¹¹ *Id.* at 411.

¹² FECA Bulletin No. 17-06 (May 8, 2017).

¹³ *Id.*

¹⁴ *J.G.*, Docket No. 12-0995 (issued October 22, 2012).

¹⁵ *Supra* note 7.

condition, his impairment rating does not comport with OWCP's procedures and was insufficient to establish ratable impairment.¹⁶

In an April 30, 2018 report, Dr. Slutsky, the DMA, reviewed Dr. Shenassas' March 6, 2018 report and noted that appellant had normal right wrist ROM. He also noted that Dr. Shenassa found a "little bit" of tenderness, but a normal physical examination, and no objective residuals related to the TFCC tear. Dr. Slutsky, the DMA, referred to the wrist regional grid at Table 15-3¹⁷ and determined that appellant fell into a class 0 for the diagnosis and therefore had a zero percent permanent impairment of the right upper extremity. He also noted that MMI was reached on March 6, 2018.

The Board finds that the April 30, 2018 impairment rating from Dr. Slutsky represents the weight of the medical evidence in this case as he properly applied the appropriate provisions of the A.M.A., *Guides* to the clinical findings of record.¹⁸ Appellant has not submitted medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, establishing that he has permanent impairment of his right upper extremity warranting a schedule award. Consequently, appellant has not established entitlement to a schedule award.

Appellant may request a schedule award or an increased schedule award at any time based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹⁹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁰

¹⁶ See *H.L.*, Docket No. 12-0510 (issued August 15, 2012).

¹⁷ A.M.A., *Guides* 396.

¹⁸ See *A.T.*, Docket No. 17-1940 (issued December 20, 2018).

¹⁹ 5 U.S.C. § 8128(a); see also *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

²⁰ 20 C.F.R. § 10.606(b)(3); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²² If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).²⁴

Appellant's May 21, 2018 request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. He is therefore not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case. Appellant submitted November 16 and December 12, 2017 treatment notes from an occupational therapist. However, this evidence is insufficient to warrant a merit review, as occupational therapists are not considered physicians as defined under FECA,²⁵ and the notes were not cosigned by a physician.²⁶ Consequently, the treatment notes submitted on reconsideration have no probative value in establishing appellant's claim for permanent impairment, and do not constitute relevant and pertinent new evidence requiring OWCP to reopen appellant's claim for consideration of the merits.

The Board finds that, as appellant did not satisfy any of the criteria under 20 C.F.R. § 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

²¹ *Id.* at § 10.607(a).

²² *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²³ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁴ When a claimant does not submit relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision. *See K.K.*, Docket No. 15-1684 (issued October 23, 2015).

²⁵ 5 U.S.C. § 8101(2); *see R.S.*, Docket No. 16-1303 (issued December 2, 2016) (occupational therapists are not considered physicians as defined under FECA); *J.J.*, Docket No. 15-0727 (issued July 16, 2015) (reports from an occupational therapist have no probative value as an occupational therapist is not a physician as defined under FECA).

²⁶ *Merton J. Sills*, 39 ECAB 572 (1988).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his right upper extremity warranting a schedule award. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 1 and May 4, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 25, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board